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Washington Focus: The Office of Information Policy trotted out a newly revised version of FOIA.gov Mar. 8 in response to a requirement in the 2016 FOIA Improvement Act that the Department of Justice establish a one-stop portal for FOIA requests. The revised site allows requesters to learn more information about the kinds of records each agency maintains, as well as more sophisticated estimates of how long FOIA requests take at each agency. Like the existing FOIA Online website, FOIA.gov allows requesters to submit requests directly to agencies. Joe Klimavicz, DOJ's Chief Information Officer, who oversaw the revisions, noted that "the National FOIA Portal exemplifies our efforts to consolidate common services with the scalability and security available in a modern cloud-based platform and allows us to rapidly deliver capabilities to improve the user experience."

FOIA in the Age of Trump: Suffering from Malign Neglect

After a year and a half in office, the Trump administration's policy on FOIA is no clearer than its policies on anything else, but based on substantial anecdotal evidence it seems to be characterized by a malign neglect on the part of political appointees that results in either ignoring requests that can be seen as questioning agency priorities or reflexively setting up barriers to access – like denying fee waivers – that make it more difficult to obtain such records. Several agencies like the State Department, the Department of the Interior, and the EPA have shifted scarce resources towards cleaning up backlogs from the Obama administration at the expense of responding to requests for records about the Trump administration. The advent of the Trump administration has resulted in a substantial increase in both FOIA requests and FOIA litigation as a number of progressive public interest organizations have sprung up and adopted the litigation model pioneered by Judicial Watch to file suit based on an agency's inability to respond within the statutory 20-day time limit. Judicial Watch continues to file suits frequently, but the pace of litigation by conservative groups has certainly decreased from its high levels in the aftermath of the Clinton email scandal.

The EPA and the Department of the Interior, the two cabinet-level agencies that have primary responsibility for implementing and overseeing environmental policy, have seen their number of requests and suits skyrocket since the Trump administration began. Using EPA's annual report, POLITICO reported that the EPA received 11,431 requests in 2017, a 16 percent increase from the last year of the Obama administration. TRAC's FOIA Project reported that the EPA had been sued 55 times since Trump took office, compared to 11 suits filed in the last year of the Obama administration, which marked an ebb for the agency from higher levels in previous years, including 28 suits in 2015. Further, based on an analysis of requests by the Project on Government Oversight conducted for POLITICO, the office of Administrator Scott Pruitt received 1,181 requests, more than five times the number of requests the office received in the last year of the Obama administration. POGO's analysis revealed that Pruitt's office had closed only 17 percent of the requests it received, although the agency overall closed 79 percent of its requests while its Washington headquarters closed 57 percent. Based on the Interior Department's annual report, the *Washington Post* reported that Interior had 8,014 FOIA requests in FY 2017 compared to 6,438 requests in the previous year. There, the *Post* found, requests to the Secretary's Office more than doubled from 509 to 1,226.

These numbers are driven by several factors. The Trump administration is widely seen by the advocacy community as being pro-business, aggressively moving to roll back Obama administration environmental policies. In such a case, FOIA becomes the main weapon for learning more about the Trump administration's policies and actions. The environmental advocacy public interest community is reasonably large and well-established, although FOIA is not necessarily a primary tool for such organizations. But groups that do use FOIA litigation such as the Sierra Club, the Natural Resources Defense Council, and the Center for Biological Diversity are now filing more suits along with an increasing number of other environmental organizations. According to the FOIA Project, WildEarth Guardians, an environmental advocacy group located in Santa Fe, has filed 24 suits since the Trump administration began, primarily against the Bureau of Land Management and other Interior Department components.

Beyond the intense interest in records about the environmental policies of the Trump administration itself, the number of requests has also risen because of an inability to obtain timely, reliable, and complete data about how officials like Pruitt, Interior Secretary Ryan Zinke, and other political appointees are spending their time, including frequently unannounced appearances with outside groups. While FOIA itself is limited to records in existence at the time the request is received, meaning that if such information has not been memorialized, it is not subject to FOIA disclosure, daily schedules of agency heads are considered quintessential public records by open government advocates and previous administrations have usually made such records publicly available in advance. One of the early victims in cutting back public availability of such records, was the decision by the Trump administration to no longer make the White House visitors' log available after a three-month delay. The ability of the public to know who is meeting with government officials has long been considered a linchpin of government accountability.

Recently a memo from BLM written in September 2017, released in response to a FOIA request, recommended the agency routinely reject fee waiver requests as a way of discouraging public interest groups from making requests. CREW has filed suit against the Department of Housing and Urban Development challenging the same kind of reflexive denial of fee waivers, indicating in its complaint that Public Citizen and other public interest groups had also seen their fee waiver requests denied.

When Trump himself has shown any interest in the subject of FOIA, it has been to reward his supporters and punish his enemies. Although many agencies have consistent and significant backlogs, only the State Department was ordered to clean up its backlog, primarily due to criticism by Judicial Watch and other conservative activists that the agency was still harboring information about Hillary Clinton. While what remains of her records probably does not constitute the majority of the agency's backlog, Trump's decision

almost certainly was motivated by a desire to uncover more dirt on her. While no other agency seems to be subject to such a presidential decree, Pruitt and Zinke have capitalized on the backlogs at the EPA and Interior to prioritize responding to requests made during the Obama administration rather than those made in the present administration. Backlogs are a serious unintended consequence of the FOIA process and agencies should be applauded for efforts to reduce or eliminate them, but not at the expense of responding to current requests. Another unintended consequence of the scramble at State to clear its backlog has been the re-emergence of a complaint by higher-level staff that they are being punished for the work they did during the Obama administration by being shifted to doing clerical work responding to FOIA requests. Many agency employees across government who do not regularly work with FOIA have always viewed it as a nuisance at best and believe it is not their responsibility. In this instance, many higher-level State employees have seen their actual jobs abolished by the Trump administration and while they may view their reassignment to FOIA as make-work jobs, it now may be the only kind of work presently available to them.

Although cutting back on the availability of government information has been a hallmark of Republican administrations, it seems almost unimaginable that the Trump administration will even bother to issue the traditional Attorney General's memo emphasizing non-disclosure over disclosure. However, replacing or cutting back on the Obama administration's executive order on classification seems slightly more likely, although there is no indication that such a policy change is in the works. What is particularly different about the Trump administration is that Trump himself seems to have a complete disdain for disclosing information. While he initially made excuses for not releasing his tax returns during the campaign, it became clear quite quickly that he never intended to disclose them. Further, the disclosure of Clinton's emails was disastrous for her, a lesson in the liability of having created records that could be made public. The routine lying by Trump and others in his administration shows that facts – in the form of government records – are the enemy.

The fact that FOIA has largely survived the dismissive attitude exhibited by the Trump administration towards disclosure of government information is a tribute to the resilience of the statute. The continued dedication of career employees who believe that professional integrity and honesty are important attributes and qualifications will probably ensure that FOIA outlasts the Trump administration.

Views from the States...

The following is a summary of recent developments in state open government litigation and information policy.

Alabama

The supreme court has ruled that the Walker County Commission does not have standing to sue the Walker County Civil Service Board for alleged failure to provide notice of meetings in which county auditor Susan Russell was reinstated after her termination by the county. After the county terminated her, Russell appealed the county's decision to the civil service board. The board reinstated her. The county then filed suit against the civil service board, alleging that it had failed to provide notice of meetings as required by the Open Meetings Act. The civil service board argued that it was not subject to the OMA and that the county did not have standing to challenge whether the board was or was not subject to the statute. The trial court ruled in favor of the board and Walker County appealed. The supreme court found the trial court did not have jurisdiction to hear the case. The supreme court noted that "because there was no justiciable controversy and the Commission sought only an advisory opinion in its complaint, the [trial] court did not have subject-matter

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jurisdiction over this action. Accordingly, we dismiss the appeal with instructions that the [trial] court vacate judgment and dismiss the case, with prejudice." (*Walker County Commission v. David Kelly, et. al.*, No. 1160862, Alabama Supreme Court, Mar. 9)

New Jersey

A court of appeals has ruled that the trial court properly awarded two local newspapers attorney's fees for litigation against the Middlesex County Prosecutor's Office to force MCPO to disclose a 911 tape of a call that led to the police shooting of an individual in their home in Old Bridge after responding to a domestic violence call. After the shooting death, NJ Advance Media and Home News Tribune requested copies of the 911 call that ended in the shooting death. MCPO denied the request, claiming the 911 tape was part of an ongoing investigation. When the newspapers threatened to sue under the Open Public Records Act, MCPO asked the trial court to issue a declaratory judgment upholding the agency's decision to withhold the tape. NJAM challenged MCPO's right to file for declaratory judgment, arguing that only a requester could file suit to enforce its rights under OPRA. HNT then filed suit under OPRA. The agency disclosed a redacted version of the 911 tape, withholding all personally identifying information. The trial court then ordered MCPO to provide a *Vaughn* index explaining the redactions. Because the newspapers claimed the *Vaughn* index was insufficiently detailed, the trial court reviewed the tape *in camera*. After the review, the court agreed the redactions were proper in light of the "incredibly private, passionate, heart-wrenching" statements. But the trial court ordered MCPO to pay attorney's fees of $71,848 to HNT and $39,583 to NJAM because their litigation had caused the agency to disclose the redacted 911 tape. MCPO argued that its motion for a protective order had resulted in the disclosure, not the newspapers' OPRA suit. The appellate court disagreed, noting that "the MCPO's repeated refusal to disclose any portion of the 911 call for three months after the Newspapers' OPRA requests provides substantial credible evidence that the Newspapers' OPRA litigations were a catalyst for the MCPO's disclosure of the call." (*Middlesex County Prosecutor's Office v. NJ Advance Media, LLC, and Home News Tribune*, No. A-1276-15T4, New Jersey Superior Court, Appellate Division, Mar. 2)

In a case involving requests from Richard Rivera and Collene Wronko for a broader range of records about the same shooting death in Old Bridge, a court of appeals has ruled that Rivera and Wronko are also entitled to attorney's fees for their litigation against the Middlesex County Prosecutor's Office. Referencing the litigation by NJ Advance Media and Home News Tribune, the court explained that when Rivera and Wronko requested the records MCPO denied them as well. After similar litigation in which the same trial court ordered MCPO to provide a *Vaughn* index for the records requested by Rivera and Wronko, the trial court also awarded their attorney $21,000 in fees and costs after finding their litigation also caused the further disclosures. MCPO argued that Rivera and Wronko did not substantially prevail because they had requested the records in their entirety and only received records that had been redacted. The appeals court noted that "plaintiffs did not specifically demand that the requested documents be 'unredacted.'" The court pointed out that while "many of the documents ultimately received were redacted, the trial court concluded that 'making redactions to records does not limit the success achieved.' We discern no abuse of discretion in that ruling and no error of law." (*Richard Rivera and Collene Wronko v. Middlesex County Prosecutor's Office*, No. a-1498-15T4, New Jersey Superior Court, Appellate Division, Mar. 20)

A court of appeals has remanded its previous ruling back to the trial court after finding the trial court failed to comply with its earlier ruling. The case involved a request by John Paff for records from the Cape May County Prosecutor's Office favorable to two police officers. CMCPO denied the request and Paff filed suit. Although the trial court ruled that the records were exempt under the Open Public Records Act, it found the CMCPO had failed to show that they were not discloseable under the common law right of access. The trial court referred to *Loigman v. Kimmelman*, a 1986 ruling by the New Jersey Supreme Court outlining a six-

factor test for determining when a record was subject to the common law right of access, but concluded it did not need to use all six factors in making such a determination. In its previous ruling, the appeals court sent the case back to the trial court to assess all six factors. Instead, the trial court, while issuing a new opinion, upheld its previous ruling with no greater level of explanation. Sending the case back to the trial court once again, the appeals court noted that "as for the trial court's view that *Loigman* did not compel it to review and make findings on the six factors, the trial court was not at liberty to spurn our instruction that it do so. It is the responsibility of trial courts to follow pronouncements of appellate courts." The court observed that "our Supreme Court has made it clear that when balancing a requester's interest in certain documents against the public's interest in confidentiality under [the common law right of access], a court must consider the *Loigman* factors." (*John Paff v. Cape May County Prosecutor's Office*, No. A-4604-14T1, New Jersey Superior Court, Appellate Division, Mar. 9)

South Carolina

A court of appeals has ruled that Scarlett Wilson, Solicitor of the Ninth Judicial Circuit, is not a public body for purposes of the South Carolina Freedom of Information Act and that records of complaints filed against her are subject to disclosure only to the extent they have resulted in disciplinary action. Phillip Bantz, a staff writer for the South Carolina Lawyers Weekly, requested the information directly from Wilson. The Ninth Judicial Circuit Solicitor's Office responded on her behalf, telling Bantz that a number of complaints against Wilson had been filed by criminal defense attorneys but had been rejected after investigation by the South Carolina Office of Disciplinary Counsel. Since Rule 12 of the South Carolina Rules for Lawyer Disciplinary Enforcement prohibited disclosure of complaints, there were no records subject to disclosure. Bantz filed suit and the trial court ruled that the records were not public records. On appeal, Bantz argued that Rule 12 did not qualify as a basis for withholding the complaints. The appeals court disagreed, noting that "because Rule 12(b) indicates lawyer disciplinary complaints do not become public until after formal charges are filed, and no formal charges were filed against Solicitor Wilson, any complaints would not be public documents, and Solicitor Wilson would not be required to disclose them pursuant to FOIA." (*South Carolina Lawyers Weekly v. Scarlett Wilson*, No. 2016-000555, South Carolina Court of Appeals, Mar. 19)

The Federal Courts...

Judge Amy Berman Jackson has ruled that Edwin Lopez **failed to exhaust his administrative remedies** because he did not appeal a decision by the National Archives and Records Administration to withhold a 40-page document referred to as the "Ed Lopez file," which Lopez contended was related to the Kennedy assassination records, because the CIA told NARA that the record was classified. Instead of appealing, Lopez filed suit against NARA and the CIA under FOIA, the **Privacy Act**, and the JFK Records Act. Lopez argued that he had constructively exhausted his administrative remedies because NARA failed to respond within the 20-day time limit. Relying on *Oglesby v. Dept of Army*, 920 F.2d 57 (D.C. Cir. 1990), Jackson pointed out that "the special right to immediate judicial review that arises from the lack of a timely response is not available if an agency responds to a request at any time before the requestor files suit." Lopez argued that *CREW v. FEC*, 711 F.3d 180 (D.C. Cir. 2013), effectively overruled *Oglesby*. In a footnote, Jackson disagreed, observing that "*CREW* dealt with a FOIA requester who brought suit *prior* to receiving a determination from the agency, while *Oglesby* concerned a requestor who – like here – brought suit *after* an agency's tardy response to a FOIA request. The option for immediate judicial review 'lasts only up to the point that an agency actually responds. Once the agency has responded to a request, the petitioner may no longer exercise his option to go to court immediately.'" Jackson added that "to permit plaintiff to ignore

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NARA's directive 'would cut off the agency's power to correct or rethink initial misjudgments or errors,' and frustrate policies underlying the exhaustion requirement." Jackson then dismissed Lopez's action against the CIA because he had not made a request to the agency, explaining that "if there is no showing that the agency received the request pursuant to the agency's published procedures, the agency has no obligation to respond to it." She added that "here, thee is no allegation, let alone evidence, that plaintiff submitted a FOIA request to CIA." Lopez argued that "'the CIA had actual notice of the request' after NARA sent it a copy." Jackson pointed out that "Plaintiff cites no case law supporting his theory that 'actual notice' may serve as an alternative to properly sending a request to an agency. . ." She added that "since it is undisputed that plaintiff's request was not sent through the proper channels to CIA, the agency was not required to respond, and plaintiff did not exhaust his administrative remedies as to that agency." Because Lopez's suit failed under FOIA, Jackson found it failed under the Privacy Act as well. She indicated that "to properly exhaust administrative remedies under the Privacy Act, a plaintiff must submit a Privacy Act request to the agency and seek review within the agency under the agency's promulgated procedures. . .Plaintiff has failed to exhaust his administrative remedies as to each defendant. Plaintiff never internally appealed NARA's determination, and plaintiff never sent a proper request to CIA." Jackson also dismissed his claim under the JFK Act because that statute did not provide a private remedy. (*Edwin Lopez v. National Archives and Records Administration and the Central Intelligence Agency*, Civil Action No. 17-0133 (ABJ), U.S. District Court for the District of Columbia, Mar. 15)

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Editor's Note: Jackson's finding that *CREW v. FEC* did not overturn *Oglesby* seems to represent the dominant interpretation in the D.C. Circuit, but shortly after *CREW* was decided, several district court judges found *CREW* did just that. While *Oglesby*'s finding that a requester needed to exhaust administrative appeals rights if an agency responded before the requester filed suit has been an accepted interpretation for nearly 30 years, that conclusion is essentially a judicial gloss based on administrative fairness rather than the literal language of FOIA. While *CREW* was about an agency's obligation to make a determination within 20 days, the court said in no uncertain terms that once an agency failed to make an acceptable determination within 20 days of a request or a subsequent appeal, the requester had an absolute right to go to court. *CREW* does not suggest that an agency can later cure its failure to meet those deadlines by responding before the requester goes to court, hence the inherent tension between *CREW* and *Oglesby*.

Judge Beryl Howell has ruled that the FBI properly issued a *Glomar* response neither confirming nor denying the existence of records in response to requests by journalist Jason Leopold and researcher Ryan Shapiro for records concerning the agency's actions taken in response to two remarks made by then-candidate Donald Trump under **Exemption 7(A) (ongoing investigation or proceeding)** and **Exemption 7(E) (investigative methods and techniques)** – one encouraging Russia to hack Hillary Clinton's emails, and the second suggesting that supporters of the Second Amendment should take action to eliminate Clinton if she were elected. Leopold and Shapiro also requested records about the Secret Service's response to Trump's Second Amendment remark and another by New Hampshire state legislator Alfred Baldasaro threatening violence against Hillary Clinton. Because the agency had publicly acknowledged its awareness of Baldasaro's remark, the agency disclosed 268 pages with redactions under **Exemption 5 (privileges)** and Exemption 7(E). The FBI told Howell that any records related to Trump's remark about Russian hacking would have become part of the special counsel's investigation into Russian interference in the 2016 election. Leopold and Shapiro argued the FBI had improperly narrowed its interpretation to include only investigative records. Howell pointed out, however, that "the FBI has credibly explained that such a literal construction of this request 'as seeking more than law enforcement records' would be 'overly broad, unduly burdensome, and inadequate to describe the records sought,' such that the FBI 'would have been unable to craft a reasonable search for such

non-investigative records.'" Leopold and Shapiro, pointing to a DOJ regulation implementing the statute's requirement that agencies contact requesters to narrow the scope of a request if the agency believes it is too broad, contended the regulation required the FBI to provide actual notice before narrowing their request. Howell disagreed. She noted that "this regulation is unavailing, however. This regulation is inapplicable since the Russia Rewards Request's reference to 'investigative records' provided a reasonable description of the records sought and allowed the FBI to limit the scope of the request to a reasonably manageable search, avoiding the need to trigger any conferral obligation under the cited regulation. . .[T]he plaintiffs' posture in this litigation in continuing to seek non-investigative records indicates that any such conferral would have been futile. Thus, while the law is clear that FOIA requests must be liberally construed, this obligation is limited by the agency's ability to identify the location where the requested records may be located and the concomitant administrative burdens of conducting the search with available search tools." After finding the agency had described its search and review of documents, Howell approved the agency's claim that the records were categorically protected under Exemption 7(A). Turning to the Second Amendment request, Leopold and Shapiro argued Exemption 7(A) did not apply once an investigation was complete and there was no indication of any ongoing investigation of Trump's remark. Howell noted that "requiring the FBI to respond to the Second Amendment Request with a substantive report would effectively reveal whether or not the agency instituted an investigation of then-candidate Trump's 'Second Amendment people' comment. . . No such investigation. . .has been publicly acknowledged, and any response other than a *Glomar* response would establish the existence or non-existence of an investigation prompted by then-candidate Trump's 'Second Amendment people' comment." She observed that "if an investigation related to then-candidate Trump's 'Second Amendment people' statement did exist, any confirmation in response to plaintiffs' FOIA request 'could reasonably be expected to interfere with enforcement proceedings.'" The Secret Service withheld records under Exemption 5 and Exemption 7(E). Howell agreed that both exemptions applied, noting that "defendants explain that the redactions on [some] of the disputed pages 'protect the deliberative process that was used to determine what particular course of criminal investigative or protective action, if any, was to be taken in response to the public comments that were the subject of Plaintiffs' FOIA requests'' and pointed out that "review of the redacted text on each of these pages confirms that this material is indeed pre-decisional and deliberative, and protected from disclosure under Exemption 5." (*Jason Leopold and Ryan Noah Shapiro v. Department of Justice and Department of Homeland Security*, Civil Action No. 16-1827 (BAH), U.S. District Court for the District of Columbia, Mar. 19)

Judge Christopher Cooper has ruled that CREW and the National Security Archive have **failed to state a claim** under the Presidential Records Act that would require the Trump White House to ensure the preservation of text messages rather than allowing staffers to use applications that automatically delete messages after they are read. Cooper also dismissed the plaintiffs' claim that the Trump administration's records-preservation practices violated the Take Care Clause of the Constitution by diminishing the availability of government information. Based on press reports that White House staffers were using applications like Confide and Signal that deleted text messages, CREW and NSA filed suit, claiming such a practice prevented the White House staff from determining whether a record qualified as a presidential record in the first instance and undermined the preservation of such records. Cooper initially noted that it was unclear whether *Armstrong v. Bush (Armstrong I)*, 924 F.2d 282 (D.C. Cir. 1991), prohibited CREW from seeking a writ of mandamus requiring the Trump White House to provide required guidance under the PRA. He pointed out that "while *Armstrong I* could be read to preclude all forms of judicial review, including mandamus, that case solely involve *APA* claims and thus did not squarely present the question of whether the PRA precludes *mandamus* claims as well. And there are reasons to think that implied preclusion of APA review might not by itself prevent mandamus review. For one, the D.C. Circuit has permitted mandamus review even when the relevant statute expressly stripped all other bases of jurisdiction." He pointed out that

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"it would be somewhat counterintuitive to conclude that a statute like the PRA (1) impliedly forecloses APA review, (2) thereby creating a need for mandamus review, and yet (3) impliedly forecloses *that* review as well." CREW based its claim, however, on a limited judicial review of guidelines outlining what was or was not a presidential record, recognized in *Armstrong v. EOP (Armstrong II)*, 1 F.3d 1274 (D.C. Cir. 1993), arguing that "it has identified a clear and compelling duty here: the duty to issue (effective) record classification guidelines." CREW contended that the PRA required the White House to assure that presidential records are preserved and maintained, as well as directing the President to categorize records as either Presidential or personal records. But Cooper pointed out that "neither of these two provisions obligates the President to perform any duty with the requisite level of specificity that mandamus requires. For one, neither provision references classification guidelines in particular, let alone commands their creation. . . Similarly, while subsection (b) might direct that records *be* classified, it says nothing about *who* must classify these records or *how* she must go about doing so. In all, the statute does not require that any particular classification guidance be created, let alone that the President must create it." He observed that "the PRA's silence as to any specific requirement is deafening for purposes of mandamus review: without a clear command to undertake any particular action, CREW has an uphill battle to show that a clear and compelling duty exists." Cooper found CREW's reliance on *CREW v. Cheney*, 593 F. Supp. 2d 194 (D.D.C. 2009), in which the court found that Vice President Dick Cheney could not disregard a duty he had under the PRA, did not apply here. Cooper pointed out that "limitations on an officer's discretion *when* undertaking a particular action do not automatically impose a limitation on the officer's discretion *to* undertake that action." Cooper dismissed CREW's Take Care Clause claim, which requires the President to faithfully execute the law, for failure to state a claim as well. He noted that "CREW does not challenge any of the President's executive orders themselves, nor does it argue that they exceed the President's authority to issue. Nor does CREW offer any reason why an administration could not, in good faith, elect to act through executive order rather than administrative action, even if that decision has incidental effects on the preservation of government records and the public's access to them." (*Citizens for Responsibility and Ethics in Washington, et al. v. Donald J. Trump, et al.*, Civil Action No. 17-1228 (CRC), U.S. District Court for the District of Columbia, Mar. 20)

Judge Amy Berman Jackson has ruled the Inspector General at the Department of Justice and the FBI conducted **adequate searches** and properly withheld records under a variety of exemptions in response to a request from Judicial Watch and William Dutton, who had been involved in providing information to law enforcement agencies pertaining to drug trafficking and terrorism in Texas and New Mexico, for records on himself. OIG located eight pages and withheld six pages under **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. After initially telling Dutton that it found no records, the FBI reopened the request after OIG identified responsive records at the FBI. This time, the FBI located 1,100 pages, disclosing only six pages in full and 79 pages in part, and withholding 1,015 pages in full under a number of exemptions. Dutton argued that the FBI should have searched using other keywords aside from Dutton's name. Siding with the agency, Jackson noted that "the information proffered by plaintiffs about how the search should have been undertaken may be based on those declarants' previous experience at the agency, but in the end, they simply offer unsubstantiated opinion or speculation about what could or should have been done and therefore fail to rebut the good faith presumption afforded to the agency's affidavits." Dutton argued that Exemption 7(C) did not apply to some records that had been withheld in full. But Jackson accepted the FBI's explanation that a letter to Senator Tom Udall was redacted "because it is very singular in nature, solely related to a third party, and if released in part, could still be used to identify the third party individual" and that other pages withheld in full under Exemption 7(C) "consist completely of pictures and personally identifiable information regarding third party individuals and no additional information can be released, without risking invasion of these individuals' personal privacy." Jackson also agreed with the agencies' Exemption 7(E) claims, observing that they were "printouts from protected FBI databases" and that "revealing the database's identity, or specific information relating to the

database, could reasonably be expected to cause harm to the investigation by revealing the type of data that is useful to the FBI's law enforcement mission. . ." (*William Wesley Dutton, et al. v. U.S. Department of Justice*, Civil Action No. 16-1496 (ABJ), U.S. District Court for the District of Columbia, Mar. 19)

A federal court in Kansas has ruled that in response to a FOIA request from the State of Kansas, the Department of Defense conducted an **adequate search** for records concerning the Obama administration's plan to close the detention facility at Guantanamo Bay and to incarcerate the remaining detainees in facilities in the United States and that except for a handful of documents, the agency properly withheld records under **Exemption 5 (privileges)**, but that **Exemption 7(F) (harm to any person)** does not apply to cost estimates. Since the federal prison at Leavenworth was one of the sites considered, Kansas had a particular interest in the proposal and to make responding to the request more manageable, Kansas agreed to narrow parts of its request to focus on Leavenworth. The agency had a single office, the Office of Detainee Policy, that was responsible for the policy. Since that office had sole responsibility for the policy, DOD decided ODP would have access to all responsive records. The agency ultimately disclosed more than 2,000 pages. Kansas challenged the search, expressing incredulity that a single office allegedly had all responsive records. The court noted that "defendant has explained that while other agencies helped with the closure plan, ODF was the hub. It oversaw all communication about the project – both within and outside defendant. While it's possible that other information may reside in another department's system, FOIA does not require an agency to search everywhere – only those places reasonably likely to have relevant information. Since ODP coordinated the entire GTMO closure effort, it is the only place likely to have relevant information." Kansas faulted the search because it did not use keywords like "detain," "transfer," and "survey." The court found that not using these terms was a reasonable decision on the part of the agency. The court pointed out that "any search for the word 'detain' likely would produce a vast load of unresponsive documents. And defendant has explained that 'transfer' and 'survey' are not terms unique to the GTMO closure process, which is why defendant chose not to use those terms." Addressing the agency's exemption claims, Kansas argued that the deliberative process privilege could be outweighed by a showing of need on the part of the requester, based on *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997), a case in which the D.C. Circuit recognized that a grand jury's need for privileged documents could overcome a deliberative process privilege claim. However, here, the court observed that "plaintiff has asserted a FOIA claim. It is not a grand jury subpoenaing documents. So, plaintiff's need for the information plays no role in the court's determination whether defendant has discharged its FOIA obligations." The court found that the agency had not sufficiently explained its Exemption 5 claims for several documents that dealt with possible costs. Noting the information could include raw data that would not be protected or cost estimates that would be protected, the court indicated that "while the withheld documents may include estimates and assumptions that defendant made when projecting costs, the court cannot conclude with reasonable certainty that the documents contain that kind of information." To help the court make such a determination, it ordered the agency to provide the records for *in camera* review. Finding several memos dealing with costs were protected by Exemption 5, the court rejected the agency's claim that they were also protected by **Exemption 7(E) (investigative methods and techniques)** and Exemption 7(F). The court pointed out that "law enforcement costs do not implicate the harms 7(E) and 7(F) are designed to protect. Costs, without copious amounts of detail, cannot disclose law enforcement techniques, procedures, or guidelines in a way that could allow someone to circumvent the law. Nor would the disclosure of costs put anyone's life or physical safety in danger. Indeed, the court can find no case where a court protected information about costs under Exemption 7(E) or 7(F)." (*State of Kansas v. United States Department of Defense*, Civil Action No. 16-4127-DDC-KGS, U.S. District Court for the District of Kansas, Mar. 21)

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Judge James Boasberg has ruled that the Executive Office for U.S. Attorneys and the U.S. Marshals Service conducted an **adequate search** for records concerning Dennis Chase's 2011 conviction on child pornography charges, properly withheld some records under **Exemption 3 (other statutes)**, **Exemption 7(C) (invasion of privacy concerning law enforcement records)**, and **Exemption 7(E) (investigative methods and techniques)**, and that in response to a referral from EOUSA, the FBI properly declined to disclose 1,216 pages of responsive records because Chase refused to pay copying **fees**. EOUSA and USMS disclosed 458 pages to Chase, but EOUSA referred 1,216 pages to the FBI for its response. Because Chase did not agree to pay fees, the FBI refused to provide the records. Chase complained that EOUSA's referral to the FBI was improper. But Boasberg pointed out that "this is not a case where one agency has attempted to pass off its FOIA responsibilities to another; rather, EOUSA properly referred material to the FBI, which, after review, was willing to release that material to Chase provided he pay the duplication fees. As the originating agency, the FBI could properly review whether any exemptions might apply before releasing the records to Chase. The only impediment to the release of the FBI materials is Plaintiff's inability or unwillingness to pay $59.70 or meet the statutory requirements for a fee waiver." Boasberg agreed that Rule 6(e) on grand jury secrecy, as well as the Child Victims' and Child Witnesses' Rights Act, qualified as Exemption 3 statutes and protected the records withheld by EOUSA. He also found that the Marshals Service's FedEx account number was protected by Exemption 7(E). Rejecting Chase's claim that he was entitled to a fee waiver, Boasberg also dismissed Chase's contention that the FBI waived its right to collect fees because it had missed the statutory time limit. Boasberg pointed out that "although this would have been the case had the FBI been requesting *search* fees, Defendant clarified that the FBI only requested *duplication* fees, which an agency can still request regardless of its non-compliance with FOIA's timeliness requirements." (*Dennis Chase v. United States Department of Justice, et al.*, Civil Action No. 17-274 (JEB), U.S. District Court for the District of Columbia, Mar. 15)

Judge Timothy Kelly has ruled that the Department of Homeland Security properly processed a request from former U.S. Immigration and Customs Enforcement employee Cynthia Roseberry-Andrews for records about her employment at ICE, but that because the agency had not sufficiently explained its **search** or **segregability** decisions, it was not entitled to summary judgment. Roseberry-Andrews requested records from eight separate offices in DHS. Roseberry-Andrews argued the agency had violated FOIA by failing to respond within the statutory time limit. But Kelly pointed out that "an agency's failure to comply with these statutory deadlines is not an independent basis for a claim." He explained that "in this case, Defendant cannot – and did not – argue that Roseberry-Andrews failed to exhaust her administrative remedies. But Defendant's failure to communicate its initial determination within 30 days does not provide Roseberry-Andrews a separate claim that it violated FOIA." Kelly agreed with Roseberry-Andrews that the agency had failed to explain why it did not search three offices identified in her request. He noted that "in light of Roseberry-Andrew's specific request that Defendant search these three additional offices and Defendant's failure to explain why it did not do so, the Court denies Defendant's request for summary judgment as to the adequacy of its search." Kelly also faulted the agency's search for its failure to explain the search terms it used and, further, why some offices used inconsistent search terms. Kelly approved the agency's exemption claims under **Exemption 5 (privileges)**, **Exemption 6 (invasion of privacy)**, and **Exemption 7 (law enforcement records)**. Kelly rejected the agency's segregability analysis, noting it was conclusory. He observed that "it is unclear on the record before the Court whether Defendant withheld any information on the grounds that it was non-segregable (and, if so, what explanation it would offer to justify such withholdings). The Court notes that similar attestations have been met with skepticism by other courts in this Circuit." (*Cynthia L. Roseberry-Andrews v. Department of Homeland Security*, Civil Action No. 16-63 (TJK), U.S. District Court for the District of Columbia, Mar. 13)

Judge John Bates has ruled that the Executive Office for U.S. Attorneys conducted an **adequate search** for records about an informant who testified at the trial of Santos Maximino Garcia and properly withheld records under **Exemption 6 (invasion of privacy)**, **Exemption 7(C) (invasion of privacy concerning law enforcement records)**, **Exemption 7(D) (confidential sources)**, **Exemption 7(E) (investigative methods and techniques)**, and **Exemption 7(F) (harm to any person)**. Garcia claimed that the agency failed to explain that Noe Cruz, who had testified for the government at his trial, had been accused of rape and later convicted. Although the agency initially issued a privacy *Glomar* response neither confirming nor denying the existence of records, which was upheld by the Office of Information Policy, Bates ordered the agency to process the request so that he could consider whether the exemptions applied to specific documents. After consulting with other DOJ components as well as the Department of Homeland Security, the government filed a summary judgment motion. Garcia, however, failed to file an opposition and Bates explained that under *Winston & Strawn v. McLean*, 843 F.3d 503 (D.C. Cir. 2016), he could accept the government's version of the facts of the case, but was required to determine independently whether the government had met its burden. Bates agreed with EOUSA that because Garcia was tried in the U.S. District of Maryland, the U.S. Attorney's Office there was the only location likely to have responsive records. Garcia was a member of the MS-13 street gang. As a result, Bates had no problem approving of the agencies' use of all the exemptions, particularly Exemption 6 and Exemption 7(C) as they applied to protect third-party information in the records. He pointed out that the agencies "raised legitimate concerns about retaliatory actions that could be taken against the law enforcement agents and cooperating witnesses whose information the agencies wish to shield—particularly given the violent tendencies of the MS-13 gang – and about maintaining the confidentiality of witnesses who cooperated with the promise that their identities would remain private." (*Santos Maximino Garcia v. Executive Office for United States Attorneys*, Civil Action No. 16-94 (JDB), U.S. District Court for the District of Columbia, Mar. 14)

A federal judge in Arizona has ruled that the U.S. Forest Service properly responded to Fred J. Schoeffler's requests for records concerning the 2013 Yarnell Hill Fire in which 19 firefighters from the Granite Mountain Hotshots were killed. The Forest Service manages an Aerial Firefighting USE and Effectiveness Study to collect data on the best way to use firefighting aircraft during firefighting suppression operations. Although AFUE teams were in the area collecting data during the Yarnell Hill Fire, all others fighting the fire were from the State of Arizona. Schoeffler requested voice recordings that AFUE may have collected. The Forest Service determined that all data collected during the fire had been turned over to the State of Arizona and subsequently made public in an electronic dropbox folder. USFS provided Schoeffler with a link to the dropbox folder. Schoeffler also requested records referring to himself made by agency employees at the Coconino National Forest. The agency located 585 pages of emails and disclosed them to Schoeffler. Schoeffler argued that the agency's search for voice recordings was inadequate because of anecdotal evidence that other records should have existed. However, the court noted that "Mr. Schoeffler has not raised substantial enough issues to question the good faith of the government's search or assertions." Turning to Schoeffler's request for emails referring to him, Schoeffler argued that his request was broader than just emails from employees at the Coconino National Forest. The court found the agency's interpretation of the request to be reasonable. The court pointed out that "although Mr. Schoeffler asserts in his Response that this was intended to request a search of wildland fire employees beyond those at CNF, it was equally reasonable for the USDA to read this as requesting communications between CNF employees and the other listed groups. Under the USDA's interpretation, a search of CNF employees' records would naturally turn up any communications CNF employees had with 'other Federal, State, and/or municipal Wildland Fire personnel and private citizens and/or legal entities.' Even construed as Mr. Schoeffler seeks, the request is overly vague." Because the court found that the agency had improperly limited its search, it declined to grant

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summary judgment on the adequacy of the email search. (*Fred. J. Schoeffler v. United States Department of Agriculture*, Civil Action No. 17-00055-PHX-GMS, U.S. District Court for the District of Arizona, Mar. 7)

In rejecting Angela Clemente's request that the full D.C. Circuit rehear her case against the FBI, Circuit Court Judge Brett Kavanaugh has once again aired his pet peeve – discarding the four-factor test for assessing whether a plaintiff is entitled to attorney's fees. Although the four-factor test appears in the Senate report on the 1974 amendments and not in the statute itself, since its appearance at that time, it has formed the basis by which courts assess whether or not to award attorney's fees. Circuit Court Judge A. Raymond Randolph was the first D.C. Circuit judge to sharply criticize the four-factor test as being unrepresentative and Kavanaugh took up Randolph's crusade in *Morley v. CIA*, 719 F.3d 689 (D.C. Cir. 2013). In his written response to Clemente's request to rehear her case, Kavanaugh noted that "this Court's four-factor test for awarding attorney's fees in FOIA cases is inconsistent with FOIA's text and structure, and impermissibly favors some FOIA plaintiffs over other equally deserving FOIA plaintiffs. In an appropriate case, I believe that the en banc Court should re-examine and jettison that four-factor test." (*Angela Clemente v. Federal Bureau of Investigation*, No. 16-5067, U.S. Court of Appeals for the District of Columbia Circuit, Mar. 9)

Judge Trevor McFadden has ruled that the Defense Department conducted an **adequate search** for a subsequent series of requests Linda Walston sent to several DOD computer-security components concerning the agency's investigation of an incident in which Walston's personal computer was found to have been hacked from an IP address from the Defense Information Systems Agency. Judge Emmet Sullivan had ruled on Walston's earlier request, but found the agency had not shown that it searched all locations likely to have responsive records. After Walston submitted the second batch of requests, Sullivan consolidated the cases. McFadden found the agency had now remedied the deficiency in its explanation to Sullivan. Walton argued that the agency's search in response to her second requests was insufficient. But McFadden explained that "Defendants aver that queries [to other components] do not create any records and that the results of the queries were documented in emails that have been identified and produced after searching for records containing Ms. Walston's last name and case number. Ms. Walston's speculation that other queries may have taken place and might have produced records that would be identified if the Defendant used certain IP addresses and search terms is insufficient to rebut the Defendants' explanation of the sufficiency of their searches." (*Linda P. Walston v. United States Department of Defense, et al.*, Civil Action No. 15-02202 (TNM) and No. 16-02523 (EGS), U.S. District Court for the District of Columbia, Mar. 8)

Judge Emmet Sullivan has ruled that the Executive Office for U.S. Attorneys has now shown which exemption claims were made by other agencies, such as the U.S. Postal Inspection Service, in response to a 57-part request by Robert Burke for records concerning Joan Markman, in whose death Burke apparently played a role. Finding that **Exemption 7(D) (confidential sources)** was appropriately claimed, Sullivan noted that "in light of the brazen nature of the investigated crime and plaintiff's ultimate conviction, it is reasonable to infer that the individual would have provided information to the FBI under an implied assurance of confidentiality." (*Robert Burke v. Executive Office for U.S. Attorneys, et al.*, Civil Action No. 15-1151 (EGS), U.S. District Court for the District of Columbia, Mar. 20)

The Tenth Circuit has ruled that the Department of Veterans Affairs properly responded to requests from Gilbert Davis for his claims file by sending him the entire file on several occasions. Davis complained that the agency never described the contents of his claims file. The Tenth Circuit, however noted that "this argument mischaracterizes the record and improperly focuses on the results of the search, not the

reasonableness of its scope. [The agency's affidavit] stated that after repeatedly searching all three VA databases, [it] gave Davis over 7,500 pages of documents comprising his entire claims file. [The agency] also cited the specific pages of documents related to [Davis's] 1997 claim. These are not general averments, and Davis cites no evidence to rebut these representations." (*Gilbert D. Davis v. United States Department of Veterans Affairs*, No. 17-1325, U.S. Court of Appeals for the Tenth Circuit, Mar. 16)

A federal court in Michigan has ruled that the Marine Corps conducted an **adequate search** for records pertaining to alleged spying activities during the Vietnam War to Dean Kibbe. Kibbe requested unit diaries from November-December 1968 for the Combined Action Program in Vietnam. Although the Marine Corps analyst found a nearly illegible copy of the records he was able to enhance them for disclosure. Kibbe argued that information was missing, but the court noted that "Kibbe provides no basis to support his assertion that information is missing from the documents produced, or that any information about daily activities exists. He has not demonstrated the existence of a genuine issue of fact concerning missing documents." (*Dean R. Kibbe v. United States, et al.*, Civil Action No. 17-12288, U.S. District Court for the Eastern District of Michigan, Feb. 28)